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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/764,995	01/26/2004	Philip Stephen Smith	PA0959.ap.US	6766
75035 7590 05/26/2009 Mark A> Litman and Associates, P.A. York Business Center 3209 w. 76th Street Suite 205 Edina, MN 55435				
EXAMINER				
MOSSER, ROBERT E				
ART UNIT		PAPER NUMBER		
3714				
MAIL DATE		DELIVERY MODE		
05/26/2009		PAPER		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Advisory Action
After the Filing of an Appeal Brief

Application No.

10/764,995

Examiner

ROBERT MOSSER

Applicant(s)

SMITH ET AL.

Art Unit

3714

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

The reply filed March 2nd 2009 is acknowledged.

1. ☒ The reply filed on or after the date of filing of an appeal brief, but prior to a final decision by the Board of Patent Appeals and Interferences, will not be entered because:

a. ☐ The amendment is not limited to canceling claims (where the cancellation does not affect the scope of any other pending claims) or rewriting dependent claims into independent form (no limitation of a dependent claim can be excluded in rewriting that claim). See 37 CFR 41.33(b) and (c).

b. ☒ The affidavit or other evidence is not timely filed before the filing of an appeal brief.
See 37 CFR 41.33(d)(2).

2. ☐ The reply is not entered because it was not filed within the two month time period set forth in 37 CFR 41.39(b), 41.50(a)(2), or 41.50(b) (whichever is appropriate). Extensions of time under 37 CFR 1.136(a) are not available.

Note: This paragraph is for a reply filed in response to one of the following: (a) an examiner's answer that includes a new ground of rejection (37 CFR 41.39(a)(2)); (b) a supplemental examiner's answer written in response to a remand by the Board of Patent Appeals and Interferences for further consideration of rejection (37 CFR 41.50(a)(2)); or (c) a Board of Patent Appeals and Interferences decision that includes a new ground of rejection (37 CFR 41.50(b)).

3. ☐ The reply is entered. An explanation of the status of the claims after entry is below or attached.

4. ☒ Other: The reply brief includes incorporated therein an Evidence appendix (pages 14-18) including evidence not previously of record (See 37 CFR 41.41). The Applicant additionally suggests that the Examiner's raised new issues that would justify the introduction of new evidence. There is no basis for the proposed justification in the cited CFR or the appellant's reasoning as this issue (breadth of the term merged) was raised in at least the Advisory action of August 1st 2008 predating the filing the appellant's brief.

/Dmitry Suhol/
Supervisory Patent Examiner, Art Unit 3714